146 US 370

Office Supreme Court U. S.
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JAMES H. McKENNEY,
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In the Supreme Court of the United States.

OCTOBER TERM, 1891.

ALEXANDER LEWIS, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
} No. 1503.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

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MOTION TO ADVANCE.

This case is a writ of error from a judgment of the district court of the United States for the western district of Arkansas, sentencing the plaintiff in error to be hanged for a murder committed some years ago in the Indian country.

In accordance with section 6 of the act of February 6, 1889 (25 Stat., 656), I respectfully move the court to advance this case to an early hearing.

W. H. H. MILLER,
Attorney General.

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ALEXANDER LEWIS,
Plaintiff in Error,

vs.

THE UNITED STATES.

No. 1018.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Brief For Plaintiff in Error.

A. H. GARLAND,
H. J. MAY,
For Plaintiff in Error.

Press of McGILL & WALLACE, Washington, D. C.

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In Error to the Circuit Court of the United States for the Western District of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

The plaintiff in error was indicted jointly with nine others in August, 1888, for the murder of Benjamin C. Tarver (Rec., 7). He was arrested in June, 1888, held in custody for about forty days, and then released. He was again arrested in the fall of 1889, kept in jail for four months and admitted to bail (Rec., 7, 257). The indictment under which these arrests were made was *nolle prossed* as to Lewis and two others on the 14th July, 1889 (Rec., 257, 272–3).

Another indictment was found against plaintiff in error and one Johnson, for the same offense, charging them with the murder of said Tarver, a white man, in the Indian country, on the 15th day of June, 1888 (Rec., 1). Upon this indictment plaintiff in error was arrested, tried, and convicted (Rec., 305), and sentenced to be hanged (Rec., 318).

It may be admitted, from the evidence, that a train on the Missouri, Kansas and Texas railroad was held up, on the night of June 15, 1888, at Verdigris bridge, in Indian Territory, and the messenger of the Pacific Express Company robbed, and in the perpetration of the robbery several shots were fired, one of which killed Benjamin C. Tarver, who was a passenger on the train (Rec., 11, 14, 19–20, 30–31, 38–39, 48–50).

It is claimed by the prosecution that a conspiracy was formed between Queen, Holleman, Johnson, Rogers, and Lewis to commit the robbery. The only witness to the formation of the conspiracy is J. T. Holleman, who was introduced to Lewis as Joe Foster, and known in the Indian country by that name. He was indicted jointly with nine others, and charged with the murder of Tarver (Rec., 7, 65, 67, 84). This indictment was pending against Holleman (Joe Foster) at the time he testified in this case (Rec., 7, 272, 273).

If the testimony of Holleman is to be believed, a conspiracy was formed near Lewis' home by Queen, Johnson, Rogers, and himself, to hold up the train and rob the express messenger. Lewis was not a party to the conspiracy, nor to the plan to the robbery, which was settled by the four men in his absence by games at cards. Holleman says Lewis joined in the conspiracy later in the day at the house, after having obtained the consent of his wife (Rec., 69, 71, 93). He further testifies that Lewis was at Verdigris bridge with those who participated in the robbery (Rec. 72–3). But according to his own statement, Holleman failed to get on the train at Gibson station, and was not present at Verdigris bridge when the train was held up and the robbery committed (Rec. 73).

Hasty, another witness, was employed by Lewis, and lived with him at the time of the robbery. He testifies that Lewis was not at home the night the train was held up and the messenger robbed, but he saw Lewis return the

evening after the robbery with a strange man (Rec., 108–9). This witness stated to persons who have been called as witnesses that plaintiff in error was at home on the night of the robbery (Rec., 161, 223). Subsequently he conceived the idea of getting money from one side or the other for his testimony (Rec., 161, 166). It seems that his reputation for truth and veracity is not very good at best (Rec., 162, 166, 205, 224, 230, 241, 243).

There are no material or important facts that substantiate the statements of these witnesses. The above is therefore a brief statement of the facts relied on by the Government.

It is claimed for the plaintiff in error that he was not a party to the conspiracy; that he was not present at Verdigris bridge when the train was held up and robbed, and that he has proved an *alibi*.

The several visits of Queen, Rogers, Johnson, and Holleman (these are all assumed names) to Lewis' house are easily and satisfactorily explained. They were all except Queen strangers to Lewis (who never went by an assumed name), and called to see Queen. Lewis had agreed with Queen, who wanted to go away, to care for and pasture his cattle for three years. But Queen returned in about a year, sooner than expected, and on account of these business relations was frequently at Lewis' house (Rec., 170, 176, 191, 258). Lewis was following legitimate pursuits with his family for a living, and there is not any proof in the record that he knew the four men who came to his house were thieves and robbers. The only testimony that connects him in any manner with crime and criminals is that of Holleman, who is by his own confession a robber and murderer, and what he swears to as to Lewis is incredible.

There was no conspiracy formed to rob the train at Lewis' house, or about his place, with which he had any connection, or of which he had any knowledge (Rec., 260, 262,

269). He first learned of the robbery on the Monday following its occurrence (Rec., 261, 271). The five robbers, one of whom was riding the "pided," or "paint" horse (but Lewis was not with them), were seen by several persons (Rec., 169, 173, 175.) He was not away from his home the night of the robbery (Rec., 179, 181, 186, 194).

Lewis was at the town of Tulsa late in the afternoon of June 15, 1888, five miles from his house and forty miles distant from Verdigris bridge, where the robbery occurred (Rec., 72, 206–7, 210, 219, 224–5, 233–5, 241, 243–6).

There is some testimony in rebuttal, but it relates principally to the confusion of dates, (1) as to the arrest of one Claywell, and (2) as to the date of the robbery, it having been originally erroneously alleged that it took place on June 16, instead of the 15th (Rec., 273 *et seq*).

The court admitted a large amount of testimony in regard to the larceny of horses by Queen, which prejudiced the case of the plaintiff in error before the jury (Rec., 78, 79, 91–3). Lewis was in no way a party to these larcenies and had no knowledge of them. He bought some of the horses from Queen, and used them openly around his place, and designated his ownership of them by putting his own brand on them (Rec., 176, 191, 258).

It is true that no objection, or exception, appears in the record to this testimony on behalf of the plaintiff in error; but the error is so plain that this court may properly notice it, at its option, under rules 21 and 35 (Boyd *v.* United States, 142 U. S., 450).

We have aimed to give the facts in the above statement as they appear from the record in the case. From the judgment of the court below a writ of error has been sued out (Rec., 321), and errors assigned (Rec., 319–21).

First Assignment of Errors.

The first assignment of errors is as follows:

"It was error for the court to direct two lists of thirty-seven qualified jurymen to be made out by the clerk, and

one given to the district attorney and one to the counsel for the defendant, and for the court to direct each to proceed with its challenges independent of the other, and without knowledge on the part of either as to what challenges had been made by the other, by which method of proceeding defendant challenged three jurors, to wit, John H. Hamilton, Britton Upchurch, and James P. Mack, who had also been challenged by the Government" (as appears from the two lists, etc.), "and for the court to direct the jury to be called from the said two lists, impannelled and sworn, whereby defendant lost the right of three challenges. The challenges to each juror should first have been made by the Government, and then by the defendant. The Government should have been required to exhaust her challenges to each particular juror, and then to pass the juror to the defendant for challenge or acceptance." (Rec., 319–20).

See also the bill of exceptions (Rec., 4–7).

The two lists, showing the challenges, are set out in the bill of exceptions (Rec., 4–6). The defendant objected to this method of challenging and impanelling the jury, but was required by the court to proceed in the manner directed, to all of which an exception was reserved (Rec., 4, 7). Section 800, R., S., was not followed by the court. There was no such mode of designating the jury practiced in the State of Arkansas that could have been adopted by rule or order of the United States Court (Thomp. & Mer. on Juries, sec. 8). The method was absolutely contrary to the practice under the statutes of that State (Dig., Stats., Ark., 1884, secs. 2228 to 2243). See U. S. *v.* Daubner, 17 Fed. Rep., 796–7, for the practice in organizing the jury in United States courts.

It will be observed that the number of jurors summoned (37) was in contemplation of the statutory number of peremptory challenges allowed on each side in a case of felony (R., S., sec. 819). If the United States attorney had first challenged five, and then passed the list to counsel

for defendant to challenge twenty, there would have been twelve left to try the case. The manner of selecting the jury in this case was not in conformity with any law or usage of the United States courts; or, if it was, the record does not show it.

It seems plain, therefore, that the jury in this case was not impanelled in accordance with the law or usage applicable to United States courts, or to the courts of Arkansas, and that its selection was absolutely illegal. The cases of Lovejoy *v.* United States, 128 U. S., 171; Spies *v.* Illinois, 123 *Ib.*, 131; Hayes *v.* Missouri, 120 *Ib.*, 68; N. P. R. R. Co. *v.* Herbert, 116 *Ib.*, 642, are all distinguishable from this one in this respect.

But it may be further suggested that the method adopted by the trial court, as above stated, was a denial of the defendant's right to three peremptory challenges. And whatever discretion the court may have in impanelling juries, the deprivation of three challenges was an injury to plaintiff in error, and such an abuse of discretion as may be reviewed by the court. (Thomp. and Mer. on Juries, sec. 269, par. 4, p. 291, and note 4).

The question presented by this assignment arose in Alexander *v.* United States, 138 U. S., 354–5, but, inasmuch as no objection had been offered or exception reserved to the method pursued in impanelling the jury in that case, the court did not pass upon the point. The question is properly before the court here.

Second Assignment of Errors.

By this assignment the question is raised as to the admission of the testimony of J. T. Holleman, alias Joe Foster, and also as to the action of the trial court in not instructing the jury to disregard the testimony after its admission (Rec., 305, 320). As stated heretofore, Holleman, under the name of Joe Foster, was indicted jointly with Lewis and others for the murder, and the in-

dictment was pending at the time he gave his testimony in this case (Rec., 7, 272–3). It seems the trial judge in his charge to the jury made the following statement: "Now, there is offered in this case what is known to the law as positive proof of the connection of the defendant with this act, of his participation in the crime of robbery, in the course of the perpetration of which a man was killed; I say, there is offered by the Government what is called 'positive evidence' of that fact, the evidence of an eye witness to the occurrence which led up to the death of Benjamin C. Tarver. That evidence goes to you, however, from the mouth of what is called in law an 'accomplice,'" etc. (Rec., 301). The court then proceeded to charge the jury in regard to the law on corroborating facts (Rec., 302–3).

The jury was misled by the language above quoted. (1) Holleman, alias Foster, the "accomplice" referred to, was not an eye witness to the occurrence that led up to the murder; he was at Gibson station, miles away from the place when and where the robbery and murder took place (Rec., 72). There is no corroborative testimony of any kind that shows Lewis was present and participated in the robbery and murder. Holleman attempts to support his statements by referring to conversations had after the consummation of the alleged conspiracy; but if such conversations were admissible and competent for any purpose, they could hardly be treated as corroborative facts (Rec., 74, 75). Upon this point there was no evidence to sustain the court in the charge given to the jury. (2) There are no facts in the record corroborating Holleman's statements that Lewis became a party to the conspiracy to rob the train.

The formation of the conspiracy and its consummation are the two material points in this case. The only testimony that connects Lewis with the conspiracy is that of Holleman, the "accomplice," which is without corroborating facts.

And there is no testimony that shows he was present and participated in the robbery that led to the death of Tarver. We submit, therefore, that the court erred in giving to the jury the charge quoted above, and also in its charge relating to corroborative facts, when there were no such facts disclosed by the evidence.

And we submit further, that in giving the charge to the jury upon these points, in the language used, the court erred, and the error is so plain that this court may notice it, whether properly assigned or not. (Rule 35.) The accused was greatly prejudiced in his trial by such a charge from the court; its influence on the jury must have been great indeed. It can be safely said there was no evidence, except that of the "accomplice," tending to connect Lewis with the conspiracy and crime. It follows, therefore, that the plaintiff in error was convicted upon the erroneous charge of the court, on the evidence of an "accomplice" alone.

Should not the court, under these circumstances, have instructed the jury to disregard Holleman's testimony?

There was no evidence independent of his upon which Lewis could have been convicted. Under the prevailing practice of the courts the jury should have been advised to disregard the testimony of the "accomplice," and as a general rule, where a verdict is rendered exclusively on such testimony it should be set aside by the court.

I. Am. & Eng. Encyc. L., p. 76, note 2;
I. Green. Ev., secs. 380, 381, and notes.

Third Assignment of Errors.

L. P. Isbell was called and examined as a witness for the Government contrary, as contended by counsel for Lewis, to section 1033 of the Revised Statutes. The name and abode of this witness was not served on the defendant two days before the trial. Affidavits appended to the motion for a new trial show that Isbell could have

been successfully contradicted, had Lewis known he was to testify (Rec., 309–10). Error is assigned on the admission of Isbell's testimony, but objection does not appear in the record to such admission, nor does it seem that any exception was reserved. This court considered this question in Logan *v.* United States, 144 U. S., 263, 303–308, concerning "witness to be produced on the trial for proving the indictment," but declined to express a definitive opinion. Nor did the court pass upon the question as to the permission by the court, at its discretion, of the testimony of witnesses not included in such list, but made necessary by reason of the unexpected developments of the trial, (*Ib.*, 306). Isbell's testimony was in rebuttal of defendants.

Fourth Assignment of Errors.

The court, in its charge in regard to the formation of a conspiracy, failed to instruct the jury as to how they should find the formation of a conspiracy, and also failed to point out to them that the testimony of an accomplice alone as to the formation of such conspiracy was insufficient, and that there should be other material testimony to establish the same (Rec., 305, 320).

We have heretofore shown, by reference to the evidence, that there is no proof whatever of a conspiracy, or of the connection of Lewis with any such alleged crime, unless the statements of the accomplice (Holleman) shall be accepted as competent and conclusive. Holleman is the only one who testifies to the formation of the conspiracy; and he was permitted to so testify before any other testimony had been adduced on this important feature in the case. It is said to be "a rule of ancient standing that the conspiracy should be first established *prima facie* before the acts and declarations of a co-conspirator can be received in evidence against another."

People *v.* Parker (Mich.), 11 West. Rep., 182.

Inasmuch as there was no evidence, positive or circumstantial, connecting Lewis with the conspiracy and murder except that of Holleman, the jury should have been instructed as to this rule of law, and also as to the competency of such evidence to prove the formation of the conspiracy.

The acts and declarations of a co-conspirator can not be used, under any circumstances, to show the conspiracy without other independent evidence.

Fifth Assignment of Errors.

The plaintiff in error proved an *alibi* as a defense in the trial court. But the court erred in its charge to the jury as to the law governing this defence, and this is made the ground of the fifth assignment (Rec., 300, 301, 305, 320). After his explanation of the defense of *alibi*, the judge proceeded to charge the jury as follows:

"This defense of an *alibi* is wholly inconsistent with the allegation in the indictment that the defendant then and there killed Benjamin C. Tarver, and, the law says, this defense is of all others the most decisive when duly substantiated or established; yet it is an easy defense to fabricate, and the most difficult to be disproved. An *alibi* that is not circumstanced as proof amounts to but little. Its value depends upon the way it is circumstanced; that is, the witness or witnesses, must be able to give you a detailed statement of such circumstances which may have occurred, which may be true in every respect, and the falsehood may be only in applying them, either purposely or by mistake, to a different time or date or hour than in that in which they occurred, and if this is done by mistake it constitutes a failure of the facts as proving facts, and if it is done wilfully it is a contrivance by which pleas of *alibi* are made very difficult to disprove and so easy to fabricate. Because this is true, and because of the liability of witnesses to honest mistakes as to times or dates when things occur, and because it is so easy to fabricate a defense of this kind, a defense of that nature is often resorted to, and is often attempted to be sustained and

made effective by fraud, subornation, and perjury. Because a defense of this nature can with comparative ease be made effective by means of fraud, perjury, and falsehood, and the ease with which defenses of this kind can be fabricated, the proof offered to sustain an *alibi* must be submitted by you to a rigid scrutiny."

It is scarcely necessary to present an argument or to refer to authorities to show this instruction is erroneous. It in effect wiped out and nullified the defence of Lewis, and practically withdrew it from the jury. The jury was told in so many words that Lewis' defence of *alibi* was founded on "fraud, subornation, and perjury," which no doubt led to a total disregard by the jury of all the defendant's testimony adduced to prove this defence. Such an instruction is in opposition to the authorities concerning *alibi* as a defence in criminal cases.

While it has been held in some of the States that this defence must be established by a bare preponderance of the evidence (State *v.* Reed, 62 Iowa, 40; State *v.* Hardin, 46 *Ib.*, 623; State *v.* Hamilton, 57 *Ib.*, 598; Turner *v.* Com'th, 86 Pa. St., 54), yet the prevailing rule seems to be, upon the weight of the decisions, that it is only necessary for the accused by such evidence, when considered in connection with all the evidence in the case, to raise a reasonable doubt as to his guilt. He is not bound to prove an *alibi* beyond a reasonable doubt.

Walters *v.* State, 39 Ohio St., 215;
Landis *v.* State, 70 Ga., 651;
State *v.* Reed, 62 Iowa, 40;
State *v.* Watson, 7 S. Car., 63;
Howard *v.* State, 50 Ind., 190;
Davis *v.* State, 5 Baxt. (Tenn.), 612;
State *v.* Josey, 64 N. Car., 56;
People *v.* Pearsell, 50 Mich., 233;
State *v.* Frey, 25 N. W. Rep. (Iowa), 738;
Watson *v.* Com'th, 95 Pa. St., 418;
People *v.* Tarm Poi, 86 Cal., 225;
Gallaher *v.* State, 28 Tex. App., 247;
Sheehan *v.* People (Ill.), 22 N. E. Rep., 818;
State *v.* Howell, 100 Mo., 628.

There was not only sufficient evidence to raise the reasonable doubt as to the presence of the accused at Verdigris bridge the night the crime was committed, but there was a preponderance of the evidence in his favor in support of the *alibi*. And this evidence was both positive and circumstantial in its character.

But the trial judge instead of charging the jury in accordance with the authorities cited above, delivered what we have quoted, which is an argument against the defence of *alibi*, and not an exposition of the law upon the subject.

He attacked, not only the defence set up by the accused, but the evidence that had gone to the jury in its support, and clouded both with suspicion, fraud, subornation, and perjury. Many cases have been reversed for language in the charge much less erroneous.

Where the trial judge charged "the defence is liable to great abuse, growing out of the ease with which it may be fabricated and the difficulty with which such fabrication can be detected," the charge was held erroneous upon the ground that the law does not attach suspicion to evidence tending to prove an *alibi* any more than it does to evidence tending to prove any other fact.

Albin *v.* State, 63 Ind., 598;
Line *v.* State, 51 *Ib.*, 172.

An instruction that the defence of *alibi* is very often resorted to by guilty persons as well as innocent ones, and one in which perjury, mistake, and deception are often committed, is error.

State *v.* Chee Gong (Or.), 19 Pac. Rep., 607.

The trial judge is very careful to state that no objection was made to the charge to the jury at the time it was delivered, but appended the motion for a new trial, by which objection is raised generally to the whole charge by

the sixth ground, and to special parts of the charge by grounds seven, eight, and nine, and an exception to his ruling thereon is allowed (Rec., 305). This was evidently intended as the bill of exceptions in this case upon the errors in the charge to the jury. Assignments of errors two, four, and five (Rec., 320) are based upon the seventh, eighth, and ninth exceptions to the charge to the jury (Rec., 305).

But we think the errors assigned in reference to the charge to the jury are so apparent on the record that it was not necessary to present them by bills of exceptions. And whether these questions have been, strictly speaking, properly presented or not, we think they can be considered by this court, especially in a case involving life, under Rules 21 and 35, without the specification or assignment of errors.

Balt. & Pot. Railroad *v.* Presb'y Church, 91 U. S., 127;
Bennet *v.* Butterworth, 11 How., 669, 675;
Young *v.* Martin, 8 Wall., 354, 357;
Clinton *v.* Miss. Pac. Ry., 122 U. S., 469, 474;
Moline Plow Co. *v.* Webb, 141 *Ib.*, 616, 623.

Respectfully submitted,

A. H. Garland,
H. J. May,
For Plaintiff in Error.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

A. X. PARKER,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

ALEXANDER LEWIS, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES. } No. 1018.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The defendant below, Alexander Lewis, is charged with the crime of murder.

The indictment charges that Alexander Lewis and James Johnson, on the 15th day of June, 1888, at the Cherokee Nation, in the Indian Country, within the western district of Arkansas, in and upon the body of Benjamin C. Tarver, a white man, did willfully and with malice aforethought make an assault, and with the bullet of a

loaded gun, discharged by them, did strike, penetrate, and wound him, the said Benjamin C. Tarver, in and upon the left side of the head of him, the said Tarver, giving to him one mortal wound of the depth of four inches, and of the breadth of half an inch, of which said mortal wound he, the said Benjamin C. Tarver, then and there instantly died.

This indictment was presented in the circuit court of the United States for the western district of Arkansas, at its February term, 1891 (Rec., p. 1).

The defendant, Alexander Lewis, appeared in the custody of the marshal, and pleaded not guilty as charged, and put himself upon the country (p. 2).

October 20, 1891, a jury was selected, and the trial of Lewis was proceeded with.

October 26 the trial was completed and the jury was charged at length (pp. 284 to 305), whereupon they returned their verdict as follows:

> We, the jury, find the defendant guilty of murder as charged in the within indictment (p. 3).

October 31, 1891, said defendant filed a motion to set aside the verdict, and for a new trial (p. 3), and afterwards filed an amended motion for a new trial (pp. 305, 308).

January 21, 1892, motion was heard and overruled (p. 3). Opinion upon motion (pp. 311 to 318).

January 21, 1892. the defendant Lewis was sentenced to be hanged on the 27th day of April, 1892 (p. 318). January 30, stay of execution was granted.

THE CRIME.

Benjamin C. Tarver, the person killed, was a white man aged about 32 years, and was on his way from Chicago, where he had been with one Sneed to aid in handling cattle, to Texas, where he resided.

The defendant, Alexander Lewis, is shown by the record to have been one of a party of 5 men who robbed an express messenger in charge of express matter then being transported by a passenger train on the Missouri, Kansas & Texas Railway.

The offense was committed about 9 o'clock p. m., at the point where the railway crosses the Verdigris River, the place being at the Cherokee Nation in the Indian Country.

The train was running south, and was stopped by the direction of one of the robbers who had reached the engine (39, 40), and the express messenger was robbed of a small amount of property.

Lewis, armed with a gun, went northerly along the westerly side of the train to the smoking car, which was the second car in rear of the express car, and saw there the "newsboy" who stood on the west side of the front platform and was looking out—having one hand upon the side of the car.

Tarver, the deceased, was in the front end of this "smoker" and had been to the door with the newsboy, and had turned back, and stood facing northerly in the aisle at the end of the first seat talking with a passenger who sat in the second, right hand seat (14).

Tarver was in the act of wiping his forehead with his left hand.

A gun was discharged (some of the testimony indicates two shots), the newsboy was wounded in the fleshy part of his forearm, and Tarver was shot through the center of the left hand and through the head, and fell dead.

The jury finds that the killing was done by the defendant, Lewis, and that he is guilty of murder, as charged in the indictment.

The five men engaged in the train robbery were Lewis, Queen (sometimes called Quinn), Rogers (alias Holloway), Holloman (alias Joe Foster), and Johnson (alias Stevens). Rogers was killed in Texas in the October following, Queen was killed a month or two later; Holloman testified on behalf of the people upon the trial now under review, and nothing appears in the record concerning Johnson's whereabouts or proceedings subsequent to 1888.

ARGUMENT.

The objections presented by the defendant in error are set forth in six assignments of error (pp. 319–321), and the same will be respectively considered in the following:

POINTS.

I.

THE COURT DID NOT ERR IN THE PROCEDURE ADOPTED IN THE SELECTION OR THE CHALLENGING OF JURORS.

This question is presented by the first assignment of error, and the proceedings of the court relating thereto are set forth in the record, pages 2 and 3 and 4 to 7.

The proceedings as set forth on pages 2 and 3 are as follows:

> TUESDAY MORNING, *October* 20, 1891.
>
> On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Barnes & Reed, and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the petit jury, as selected and drawn by the jury commissioners for

> the present term of this court more than two entire days heretofore, and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of the plaintiff, by its attorney, ordered that a jury come to try the issue joined; whereupon the clerk called the entire panel of the petit jury, and, after challenge by both plaintiff and defendant, the following were selected for the trial of this cause:
>
> [Names], * * * twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence; and after hearing a portion of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court.

It appears that duplicate lists of the 37 jurors were by the court caused to be delivered to the counsel for the respective parties, with directions to make their challenges independently of each other.

The whole proceedings, omitting the names, captions, etc., are as follows (pp. 4 and 7):

> Be it remembered, that on the trial of the above-entitled cause the court directed two lists of 37 qualified jurymen to be made out by the clerk, and one given to the district attorney and one to the counsel for the defendant; and the court further directed each side to proceed with its challenges independent of the other and without knowledge on the part of either as to what challenges had been made by the other.
>
> To which method of proceedings in that regard defendant at the time excepted, but was required to proceed to make his challenges, and he challenged

20 persons from the list of 37 persons from which he made his challenges, but in doing so he challenged 3 jurors who were also challenged by the attorney for the Government, to wit, James H. Hamilton, Britton Upchurch, and James P. Mack. The Government, by its district attorney, challenged from the list of 37 jurors 5 persons. In making its challenges the same three persons as those challenged by the defendant, to wit, James H. Hamilton, Britton Upchurch, and James P. Mack, were challenged by the Government, as appears from the lists of jurors used by the Government in making its challenges and the defendant in making his challenges.

The 12 persons who were left of the panel of 37, after both sides had made their respective challenges, were the ones selected to try, and who did try the case.

To the happening of the fact that both parties challenged the same three jurors, the defendant at the time objected, but the court overruled the objection and directed the jury to be called from the said two lists empaneled and sworn, to which the defendant at the time excepted.

The statute (R. S., sec. 819) directs that:

When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges.

A.

In order to provide for 25 challenges and 12 jurors there must be a panel of at least 37 qualified jurors.

As no statutory method of proceeding in challenging exists, the court, keeping within the boundaries of justice

and the precedents, is clothed with discretionary power to direct the procedure. Any other course would take the control of the trial from the bench.

The authority of the court as to challenges is expressly recognized in said section 819, the concluding sentence of which directs that all challenges to jurors shall be tried by the court, without the aid of triers; and by section 1031, which directs that in capital cases if the defendant peremptorily challenges jurors above the number allowed him by law the excess shall be disallowed by the court, and the cause shall proceed as if they had not been made.

As all of the jurors to whom the defendant objected were excluded, it is not seen that he has any reasonable or legal ground for complaint.

The complaint presented by this assignment of error reduces itself at once to an objection that because the prosecution challenges three jurors that are also challenged by the defendant, therefore the defendant is entitled to three more or contingently to 23 peremptory challenges. The defendant made his 20 challenges, and the 20 so challenged went aside; the fact that the Government challenged 3 of these men took nothing from the prisoner that the statute gave to him.

By the statute this defendant was entitled to twenty peremptory challenges. He made the twenty challenges; they were allowed, and the statute was satisfied.

If the defendant assumes that he is entitled to be advised of the views of the counsel for the People as to the fitness of individual jurors, as shown by the challenges made on behalf of the prosecution, and assumes that he has the right to be advised of the names challenged by

the prosecution, and the right to challenge, not 20 of 37 jurors, but 20 of 32 jurors, then the assumption is broader than the enactment.

Since the trial of the case now at bar the judge who presided thereat has had occasion to review the question now under consideration in the case of *The United States* v. *Garrett*, and to render a carefully considered opinion thereon.

The following is excerpted from the MS.:

UNITED STATES
vs.
ROBERT L. GARRETT.

PARKER, *J.*

Section 819 of the Revised Statutes of the United States is from the act of June 8, 1872, and it is as follows:

When the offense charged is treason, or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges

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It expressly gives the right of peremptory challenges to a defendant in a murder case to the number of twenty and no more, and to the Government to the number of five and no more. This law makes it necessary in a case of murder that there should be a panel of 37 persons selected in the way provided by law, and generally qualified as jurors, so that when the challenges of the defendant and the Government are made, making twenty-five in all, there shall remain 12 qualified jurors to try the case. When there is no statute prescribing the order in which challenges to jurors shall be made, or directing whether the Government or the prisoner shall first exercise the right,

the course of proceeding in this respect is left to the discretion of the trial court. (*Turpin* v. *State*, 2 Crim. Law Mag., 532, and authorities there cited.)

This case is the leading case on the subject, and it states the rules therein set out in a succinct and clear manner, and as they are sustained by the authorities generally. Under the law the method of challenge when there is no statute directing its order is a mere rule of practice to be adopted by the court, the rule to be of such reasonable character as to enable the respective parties to fairly make their challenges. The rule adopted by this court, and the one applied to this case, is that printed lists of the panel of 37 qualified jurors are handed by the clerk, one to the district attorney and one to counsel for the defendant. They are then ordered by the court to make their respective challenges in such reasonable time as may be necessary to enable them to complete their challenges. The challenges are made by each party irrespective of those made by the other. One does not know who the other may challenge.

When the parties have made their peremptory challenges each list is handed by the counsel to the clerk, who calls the jury from the first 12 remaining unchallenged on the list. The jurors challenged do not know which side has challenged them. This method of challenge prevents that prejudice which is often created against counsel and parties in the minds of jurors who are challenged, when they are enabled to know by open announcement who challenges them. A rule that prevents this, especially when there is a long term of court and many cases to try, certainly is a rule in the interest of justice, and one that will secure trials by a dispassionate jury. Peremptory challenge, in practice, means "An exception to the jurors who have been arrayed to pass

upon a cause upon its trial, without assigning any reason." (1st Bouvier's Law Dic., 253.) "Objection to a juror, or jurors, drawn to try a cause for which no reason is assigned." (Anderson's Law Dic., 162.) The right of peremptory challenge is the right to exclude from the panel those who may be suspected of entertaining a prejudice against a party where sufficient reasons can not be given for their exclusion for cause. (Proffatt on Jury Trials, Sec. 155, *Turpin* v. *State*, *supra*.)

It may be remarked that the above case is one decided by the supreme court of Maryland, and is very important as having a direct bearing on the last point named. It is also valuable because of the authorities referred to. Mr. Thompson on Trials, sec. 43, says: "It is a fundamental principle that the right of peremptory challenge is a right to reject and not a right to select." Many authorities are referred to by the author in his note to the above section of the text. To challenge 20 jurors means to object to 20 jurors. This right to object to 20 jurors is a right to be exercised by the defendant irrespective of the exercise of the right by the Government. The Government may waive the right and defendant will still have it to the number of 20, but he would have no right to challenge any greater number of jurors than 20 because the Government has not exercised its right of challenge to the full number. The defendant has a right to object to 20 persons of the 37 as so many persons he is not willing to be tried by. He has no right to complain if he is tried by any of the jurors outside of the 20 he challenges. He can demand nothing more.

It is not complained in this case that an impartial jury is not secured by this method to try this case from those who are not challenged by either side. It

was only complained in the case of *United States* v. *Alexander Lewis*, recently tried for murder in this court, that the defendant's challenges and those of the Government happened to strike three of the same men. A double reason why they should have been set aside. If from those who remained an impartial jury is obtained after the defendant has asserted his twenty objections, he has no right to complain, as his constitutional right is maintained. (*Hays* v. *Missouri*, 120 U. S., 68.) In the above case Mr. Justice Field, in accordance with the general doctrine, declared: "The right to challenge is the right to reject, not to select a juror." This doctrine has been distinctly recognized by the Supreme Court of the United States, and by the courts of the several States, as long ago as the case of the *United States* v. *Marchant* (12 Wheat., 480), in the decision of which Mr. Justice Story said:

"The right of peremptory challenge is not of itself a right to select, but a right to reject jurors; it excludes from the panel those whom the prisoner objects to, until he has exhausted his challenges, and leaves the residue to be chosen for his trial according to the established order or usage of the court. The elementary writers nowhere assert a right of this nature in the prisoner, but uniformly put the allowance of peremptory challenges on distinct grounds. Mr. Justice Blackstone, in his Commentaries (4th Bl. Comm., 353), puts it upon the ground that the party may not be tried by persons against whom he has conceived a prejudice, or who, if he has not successfully challenged them for cause, may, on that account, conceive a prejudice against the prisoner. The right, therefore, of challenge does not necessarily draw after it the right of selection, but merely of exclusion. It enables the prisoner to say who shall

not try him, but not to say who shall be the particular jurors to try him. The law presumes that every juror sworn in the case is indifferent and above legal exception, for otherwise he may be challenged for cause. What jury in particular shall try the cause depends upon the order in which they are called, and the result is a mere incident following the challenges, and not the absolute selection of the prisoner, resulting from his power of challenges."

The section of the law above set out gives the right of challenge, but does not prescribe the method of its exercise, and the right is not to be exercised according to the method practiced in the courts of the State where the court sits, but is to be exercised according to the established order or usage of the court in which the challenges are made. This usage should be such as to give the defendant the right to reject 20 of the jurors of the panel of 37. When this is done the defendant has exercised all the right he has in regard to challenging the jury.

The case of *Turpin* v. *State* (Criminal Law Mag., vol. 2, p. 532) cited in the foregoing opinion, was decided by the Maryland court of appeals, October term, 1880.

The head notes in point are as follows:

Where there is no statute prescribing the order in which challenges to jurors shall be made, or directing whether the State or the prisoner shall first exercise the right, the course of proceeding in this respect is left to the discretion of the trial court.

The right of peremptory challenge is a right only to reject, not to select, the jurors.

The importance and value of this opinion justify the presentation here of so much of the same as relates to the question now before this court, viz:

> BARTOL, *J.*, delivered the opinion of the court.
>
> The appellant was indicted in the circuit court for Wicomico County for the murder of William F. Farrington, and was found guilty of murder in the second degree. During the trial he took six bills of exceptions to the rulings of the court below, which are brought before us for review on this appeal.
>
> First exception--One of the panel of jurors was called, and being sworn and examined upon his *voir dire*, it was determined by the court that he was an impartial juror; the prisoner then by his counsel moved the court to require the State to exercise its right of peremptory challenge before the prisoner should be required to exercise that right. But the court overruled the motion and required the prisoner to exercise his right of peremptory challenge before the State was called on to exercise its right, whereupon the prisoner excepted. It is stated in the bill of exceptions that this ruling was in conformity to the uniform practice in that court.
>
> "Peremptory challenges are those which are made to the juror without assigning any reason, and which the courts are bound to respect." (1 Chitty Crim. L., 537, m.) The right of peremptory challenge is deemed a most essential one to a prisoner, and is highly esteemed and protected in law. It is the right to exclude from the panel those who may be suspected of entertaining a prejudice against a party, where sufficient reasons can not be given for their exclusion for cause. (Proff. on Jury Trials, § 155.)
>
> The right of challenge in capital cases was recognized in England for a long period of time, to the

number of 35. It has since been regulated there by various statutes, which need not be here referred to. In this state it has been secured to the prisoner by the acts of 1737, (ch. 2); 1744, (ch. 20); 1751, (ch. 14;) 1809, (ch. 138, § 13;) 1816, (ch. 45.)

By the act of 1841 (ch. 162), the right of peremptory challenge was extended to every person indicted for any crime or misdemeanor, the punishment whereof was confinement in the penitentiary. This act was incorporated in the code, article 50, section 15, which provides further that the accused shall not challenge more than 20 jurors without assigning cause. So stood the law before the act of 1872 (ch. 40). This was an act to repeal section 15, article 50, of the code, and to reenact the same with amendments, giving to the State the right of peremptory challenge in certain cases, and provides (that the right of peremptory challenge shall be allowed to any person who shall be tried on presentment or indictment for any crime or misdemeanor, the punishment whereof, by law, is death or confinement in the penitentiary, and to the State on the trial of such indictment or presentment; but the accused shall not challenge more than 20 nor the State more than 4 jurors without assigning cause).

Before this act was passed no right of peremptory challenge by the State existed in Maryland, except in the city of Baltimore, under the act of 1860 (ch. 308, § 18, 2 code, § 618).

"By the common law the prosecution in criminal cases could exercise on behalf of the crown peremptory challenges to an unlimited extent without alleging any other reason than *quod non boni sunt pro rege.*" (Proff. on Jury Trials, § 159.) This was changed by the statute of 33 Edw. I, c. 4, which, while it took away from the crown the unlimited right or peremptory challenge, was construed by the courts

to allow the prosecution a qualified right of peremptory challenge, which was exercised by allowing the prosecution the privilege of setting aside jurors when called, without assigning cause, until the panel was exhausted, when, if the full number was obtained, such jurors were not called, but if not, their names were afterwards called on the general list. (*Rex v. Frost*, 9 Car. & P., 136; *Mansel v. Queen*, 8 E. & B. 54.)

In Brandreth's case the question arose whether the prisoner should be required to exercise the right of peremptory challenge before the right of challenge was exercised by the crown, and after full argument it was decided that according to the uniform practice the right must first be exercised by the prisoner. (32 State trials, 771, 774, 775.) A similar decision had been made in *Layer's Case* (16 State trials, 135). We refer also to *State* v. *Bone* (7 Jones (N. C.) L. 121). In *Jones* v. *State* (2 Blackf. (Ind.) 475) the same question here presented arose under the Indiana statute. The circuit court overruled the motion of the defendant that the State's attorney should be required first to accept or reject the jurors before the defendant should be called on to make his election, and certain jurors, after they had been accepted by the defendant, were set aside by the prosecuting attorney which was alleged as error. The appellate court, in disposing of the question, said: "The only question on this point is, who shall first make his challenge. If this were a new question and we had it to settle, we should say that the State ought first to make her challenges, but as all the English authorities establish a different doctrine and no American cases have been seen by us to authorize a different practice, we are bound for the present to sanction what the circuit court has done."

In *State* v. *Hays* (23 Mo., 287) a similar question arose. The Missouri statute, like our act of 1872, allowed the accused twenty peremptory challenges and the State four; the prisoner moved that the State should be required to exercise its right of challenges first; this was overruled, and the panel or list of jurors was furnished to the State's attorney and to the prisoner, and each was required to exercise his right of peremptory challenge at the same time by striking from the list of 36 jurors the objectionable names, neither knowing which had been stricken by the other. This was alleged as error and cause of reversal. The supreme court, speaking by Judge Ryland, said.

"We do not think this such an error as would justify the court in reversing. The prisoner does not appear to have been deprived of any legal right. In what order the parties shall exercise this right is a matter within the discretion of the circuit court. The simplest rule upon this subject, and one to which there would seem to be no objection, is that of requiring the parties to challenge as the jurors are called, and pronounced qualified, the plaintiff always speaking first.

"This rule, I believe, has been generally practiced, at least as far as my experience upon the circuit court extends. I never knew it deviated from, and that experience embraces a period of eighteen years. But as the rule adopted in this case deprives the prisoner of no legal right, and it does not appear that the discretion was exercised oppressively, it forms no ground for reversal. The right of peremptory challenges is a right to reject and not to select a jury." In *State* v. *Sleeley* (65 Mo., 219) it was decided that in criminal cases the State must announce her peremptory challenges of jurors before the defendant can be re-

quired to announce his. But that decision was made under a statute which, in express terms, prescribed that course of proceeding.

The act of 1872 does not prescribe the order in which the challenges shall be made, or direct whether the State or the prisoner shall first excercise the right. It would seem, therefore, that the course of proceeding in this respect is left to the discretion of the circuit court. It appears from the statements of my brothers who preside in the circuits that the practice has not been uniform, while in several of the circuits the practice has been to require the State to challenge first; in the city of Baltimore, in the fourth circuit, and in the circuit from which this appeal comes, a different rule has prevailed. But it seems to us very clear that the action of the circuit court on this question can furnish no ground for reversal. The appellant has not been deprived of any legal right. This complaint is that by the ruling of the court below, after having accepted certain jurors, they were challenged by the State, and he was thus deprived of jurors of his selection. But the law gives him the right only to reject, not to select, the jurors.

This subject was fully considered in the able opinion of Judge Story in *United States* v. *Merchant and Colson* (12 Wheat. (U. S.), 480). There two parties were indicted jointly and claimed the right to sever and be tried separately. This was denied and this ruling was alleged as error. But the court held it was not error to require them to be tried together. If tried in that way it was conceded that each of the accused had the right to challenge the whole number allowed by statute, and it was contended on the part of the accused that one might desire to retain a juror who is challenged by the other, and if challenged by one he must be withdrawn as to both, and

thus the right of selection would be virtually impaired. In answer to this argument the learned judge sai d:

"But it does not appear to us that this reasoning can, upon the principles of common law, be supported. The right of peremptory challenge is not of itself a right to select, but a right to reject, jurors. It excludes from the panel those whom the prisoner objects to until he has exhausted his challenges and leaves the residue to be drawn for his trial, according to the established order and usages of the court. The elementary writers nowhere assert a right of this nature in the prisoner, but uniformly put the allowance of peremptory challenges upon distinct grounds.

"Mr. Justice Blackstone, in his Commentaries (4 Bl. Com., 353), puts it upon the ground that the party may not be tried by persons against whom he has conceived a prejudice, or who, if he has unsuccessfully challenged them for cause, may on that account conceive a prejudice against the prisoner. The right, therefore, of challenge does not necessarily draw after it the right of selection, but merely of exclusion. It enables the prisoner to say who shall not try him, but not to say who shall be the particular jurors to try him. The law presumes that every juror sworn in the case is indifferent and above legal exception, for otherwise he may be challenged for cause."

The reasoning of the learned judge is applicable to the question before us. The only ground of objection to the ruling of the circuit court, urged by the appellant, is that he was thereby deprived of jurors who were acceptable to him; but it is obvious that the same result might follow, whether the right of challenge by the state be exercised before or after the

prisoner has spoken. In either case the prisoner would not be deprived of any legal right which, as we have seen, is not a right to select the jurors, but simply to reject such as he may consider objectionable, to the number of twenty. This privilege was enjoyed by the appellant without restriction. And as the statute does not prescribe the order in which the challenges shall be made by the prisoner and the state respectively, the determination of that question was left to the judgment and discretion of the circuit court. It follows that the ruling contained in the first bill of exceptions furnishes no cause for reversal.

Thompson on Trials, says:

SEC. 43. *Nature of this right.*—It is a fundamental principle that the right of peremptory challenge is a right to *reject* and not a right to *select*. Therefore, a party can not, in general, complain that the court has *excused* jurors without cause, or sustained untenable challenges of the other party, thus driving the objecting party to exhaust his peremptory challenges upon *other members* of the panel, or upon special veniremen or talesmen.

Counsel for Lewis did not attempt to stand aside any of the panel, except the 20 who were stricken from it.

B.

LEWIS WAS TRIED BY A QUALIFIED AND AN IMPARTIAL JURY.

It is noteworthy that the defendant makes no complaint that he was not tried by an impartial jury.

No objection appears to be made against the panel or against any individual juror not excluded.

He was entitled to an impartial jury, nothing more, and it seems preposterous for him to complain that he is injured in his rights because the trial was not so managed by the court as to give him an opportunity to challenge three of those listed that he makes objection to.

This court held, in 1827, *United States* v. *Marchant* (12 Wheat., 482), as quoted in *Turpin* v. *State, supra*, that the right to challenge is not a right to select.

In *Hayes* vs. *Missouri* (120 U. S., 71) where the question of allowance of a greater number of peremptory challenges in cities of a specified population than in those of a less population was brought before the court, it is said with great significance, that:

> * * * The accused can not complain if he is still tried by an impartial jury. He can demand nothing more. (*Northern Pacific Railroad* v. *Herbert*, 116 U. S., 642.) The right to challenge is the right to reject, not to select a juror. If from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained. In this case it is not even suggested that the jury by which the accused was tried was not a competent and impartial one.

In the *Northern Pacific Railroad Company* cited above (116 U. S., 642) one was presented as a juror, was challenged, and the allowance of the challenge is charged to be error. The court said (p. 646).

> It does not appear whether the challenge was for cause or was peremptory. Under the statute of Dakota each party is entitled to three peremptory challenges. It is for the party asserting error to show it; it will not be assumed. But if we regard the chal-

lenge as for cause, its allowance did not prejudice the company. A competent and unbiased juror was selected and sworn, and the company had, therefore, a trial by an impartial jury, which was all it could demand. (*United States* v. *Cornell*, 2 Mason, 104; *Heaston* v. *Cincinnati and Fort Wayne Railroad Co.*, 16 Ind. 275, 279; *Atchison, Topeka and Santa Fe Railroad Co.* v. *Franklin*, 23 Kansas, 74; *Carpenter* v. *Dame*, Lo. Ind. 125, 130; *Morrison* v. *Lovejoy*, 6 Minn. 349, 350.)

As it is established by this court that: "the right to challenge is the right to reject, not to select a juror;" and that all that the accused can demand is, "a trial by an impartial jury;" and that he "can not complain if he is still tried by an impartial jury;" and, as it is neither shown nor claimed that the jury that found Lewis guilty was otherwise than a qualified and an impartial jury, it is conclusive that this assignment of error is destitute of merit.

II.

THE SECOND ASSIGNMENT OF ERROR IS, IN ITSELF, A MANIFEST ERROR.

This assignment is based upon the assumption that the court below erred in receiving the testimony of J. T. Holloman (alias Joe. Foster), and in not instructing the jury to disregard the same.

Tarver was killed in June, 1888; in August, 1888, an indictment was found and filed (pp. 7, 8), charging eleven persons, including "A. S. Lewis" and "Joe. Foster," with murder on account of such killing. This indictment has

remained dormant. It is conceded that "Joe. Foster" is "J. T. Holloman," who testified on behalf of the prosecution (p. 65).

Lewis was tried in October, 1891, upon an indictment filed in February, 1891. A *nolle prosequi* was entered upon the indictment of 1888, as to Lewis, previous to his trial (p. 273).

Not only is the defendant, Alexander Lewis, tried separately, but neither of the names, "Joe Foster" or "J. T. Holloman," appear in the indictment upon which he is tried.

Defendant assumes, because the witness was named in the indictment of 1888, that has become dormant, and that had apparently been abandoned, that therefore he was incompetent to testify against Lewis upon the trial under the indictment of 1891.

J. T. Holloman's examination appears in the record (pp. 65 to 107) at length; the introduction thereof is as follows:

> J. T. HOLLAMAN, having duly sworn, was called upon behalf of the Government, and, being examined by the district attorney, testified as follows, to wit:
>
> Question. What is your name?
>
> Answer. James T. Hollaman.
>
> Question. Where is your home?
>
> Answer. In Texas; Rogers Prairie.
>
> Question. Do you know the defendant, Alexander Lewis, in this case?
>
> Answer. Yes, sir.
>
> Question. Where did you live in the early part of 1888?
>
> Answer. After April I lived at Rogers Prairie.

Question. Where is that?

Answer. In Texas.

The conclusion of his testimony is set forth (p. 107) as follows:

Question. I want to know whether you swore the conspiracy was formed on the 12th of June. Did you swear that?

Answer. I don't remember whether I did or not.

Question. You deny, now, that you knew that you were indicted in this court for murder by the name of Foster?

Answer. Knew nothing of it.

Question. Don't you know that indictment is pending here to-day, has never been nolle prossed against you?

Answer. I never knew nothing about it.

It appears that Holloman was also examined before United States Commissioner Brizzolara, December 31, 1890, and this examination is put into the case by the defendant in his own behalf (pp. 250 to 256). The introduction of this testimony occurred as follows:

After defendant's witness had concluded his testimony, (p. 250), this appears:

Mr. BARNES. In order to save time we have agreed to consider the testimony of Mr. Holloman before Commissioner as in evidence.

The COURT. Very well.

Mr. BARNES. I desire to offer to prove that the original indictment against Holloman, alias Jo. Foster, is still pending.

The DISTRICT ATTORNEY. I don't know whether it is or not; we can find out in the morning.

The deposition is then given at length.

First. Holloman was examined on behalf of the people without the interposition of any objection thereto on the part of the defendant. Defendant took no exception whatever to the admission of Holloman as a witness. The trial judge notes this fact in his opinion upon the motion for a new trial. Defendant cross-examined the witnesses at great length (pp. 82 to 103) and recross-examined him (106).

A person who is upon trial can not be permitted to gain what he may from the examination and cross-examination of his accomplice and afterwards call for a new trial because that accomplice was under an indictment for the same offense.

Second. The court below considered the question of the nonnecessity for the dismissal of the indictment pending against the witness in the opinion delivered upon the motion for a new trial (p. 311), and refers to the doctrine laid down in the "Whiskey Cases" in support of his views.

Upon this branch of the argument counsel begs to refer to and adopt the statement of the learned judge.

Third. Not only is one charged by an independent indictment with the same offense as that for which a person being tried stands charged, a competent witness, but a coindictee in the same indictment is a competent witness for the prosecution upon the separate trial of one of those with whom he is jointly indicted.

The first paragraph of the opinion in the *Whisky Cases* (99 U. S., 594) is as follows:

> Accomplices in guilt, not previously convicted of an infamous crime, when separately tried, are competent witnesses for or against each other; and the universal usage is that such a party, if called and examined by the public prosecutor on the trial of his associates in guilt, will not be prosecuted for the same offense, provided that it appears that he acted in good faith and that he testified fully and fairly.

In *State* v. *Brien* (3 Vroom, 414) defendants were indicted jointly for conspiracy. Smith was put on trial, and Brien, who had not pleaded, was offered by the State as a witness against him. The court admitted the witness, and the question came before the supreme court of New Jersey, on certification, for review, and the witness was held competent.

In an able discussion of the question, the court, Beasley, C. J., says:

> The oldest allusion to the subject which I find in the books is in the case of the *King* v. *Desmond* (Noy's R., 154), in which it is said "that if there be divers defendants, and one of them does not accuse himself, but accuses his companion, another defendant, he shall not be received as a competent testimony to condemn his companion." It does not appear whether the trial to which this extract relates was joint or several, and, in view of this fact and of the unreliable character of the book from which it is taken, the precedent is not entitled to much attention. Taking it for what it is worth, it is opposed to the idea that in no case can a defendant, being a party to the record, be received as a witness prior to his conviction or acquittal.

Further on the opinion continues:

> Lord Hale twice refers to the case above cited from Noy's Reports, and appears to have entertained no doubt that the witness, under the circumstances stated, was competent; and in another place, considering the subject of the admissibility of accomplices, says, in laying down the usual practice: "The party that is the witness is never indicted, because that doth much weaken and disparage his testimony, but possibly not wholly take away his testimony." Mr. Starkie (vol. 2, p. 11) thus defines the doctrine: "An accomplice, as it seems, is a competent witness, and may be examined, if he be willing, although he is indicted along with others, provided he be not put upon his trial at the same time with the others, for an indictment against (more than one is) several as to each." A similar view of the law will be found to be expressed in the following treatises: 4 Haw. P. C., 435; 2 Russ., 957; Roscoe's Cr. Ev., 141.

The court comments upon the cases as follows:

> Testing the question, then, by the standard of reason, I think the witness was properly received. I can perceive no propriety in the exclusion of a codefendant on a joint indictment on the separate trial of his companion, and his admission, which is of undoubted legality, if he and his codefendant are indicted separately, because when criminals, though indicted together, are tried apart from each other, they are as much disconnected, in point of fact, as if the indictment were several. Under such circumstances the testimony which the witness delivers can not in any sense affect him in the remotest degree. The judgment of conviction or acquittal of the party on trial can not be received in evidence when his own case comes to a head, either for or against him.

> Such judgment can not, in any respect, affect his own interests or prejudice his rights. The only reason for the rejection of such a witness is that his own accusation of crime is written on the same piece of paper, instead of on a different piece, with the charge against the culprit whose trial is in progress.

Noyes v. *State* (12 Vroom R., 429) treats the question as settled in New Jersey.

One who was jointly indicted was called as a witness on the part of the State; the court of review said:

> Again, it is urged that it was error in the court to permit Stedwell, who was jointly indicted with Noyes, to be examined as a witness on the separate trial of the latter.
>
> This question was deliberately considered and decided by this court in the case of *State* v. *Brien* (3 Vroom, 414). The doctrine was incidentally sanctioned in the court of errors in the case of *Hunter* v. *State* (11 Vroom, 495). I can see no reason why the decision referred to should be disturbed.

Carroll v. *The State* (5 Nebr.) is in point, the headnote being:

> WITNESSES. When separate trials are awarded to parties jointly indicted, each is a competent witness for the State upon the trial of the other, without being first acquitted or convicted and without a *nolle prosequi* being first entered upon the indictment.

In *Allen* v. *The State* (10 Ohio Stat., 303) it is said:

> It is said to be a settled rule of evidence that a *particeps criminis*, notwithstanding the turpitude of his conduct, is not on that account an incompetent witness, so long as he remains not convicted and sentenced for an infamous crime; and it makes no

> difference as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in crime. (1 Greenleaf Ev., 379; *Jones* v. *State of Georgia*, 1 Kelly, 610; *Noland* v. *The State*, 19 Ohio Rep., 131.)

In *Wixson* v. *The People* (5 Park. Cr. R., 119) (1860) the question was distinctly presented. The court says (p. 126):

> An examination of the cases will show that the correct rule as to the admissibility of accomplices is this: When the persons indicted are all put on trial together, neither can be a witness for or against the others; but when they are tried separately, though jointly indicted, the people may call those not on trial, though not convicted or acquitted or otherwise discharged, with the permission of the court; but they can not be called as witnesses for each other, though separately tried, while the indictment is pending against them. * * * When all are tried together, if the people desire to swear an accomplice, he must in some way be first discharged from the record.

This view is supported by *Lindsay* v. *People* (63 N. Y., 153), where it is said that—

> Accomplices may in all cases, by the permission of the court, be used by the Government as witnesses in bringing their confederates and associates to punishment, and whether more or less guilty does not affect their competency, but the extent of their guilt and the nature of their offense go to their credit with the jury.

In 1877 the question came before the supreme court of the State again in *Taylor* v. *The People* (12 Hunn, 212),

Mr. Justice Talcott presenting the views of the court and following *Wixson* v. *The People*.

In 1884, in *State* v. *Barrows* (76 Maine, 401), Peters, C. J., in presenting the opinion, discusses the question here involved at length, and fully sustains *Wixson* v. *The People*, citing many authorities.

It is said (p. 410) that—

* * * * *

> Courts seemed inclined not to regard a codefendant in a criminal case as a party, unless "a party to the issue on trial." That distinction is taken in the English cases before cited. To be incompetent to testify the defendants must be in charge of the same jury. Mr. Starkie struck the same key, who declared that "an indictment against several is several as to each."

A like conclusion is reached in *State* v. *Nash* (10 Iowa, 81).

Several elementary writers assert, without qualification, the rule for which we are contending.

Wharton's Criminal Evidence, section 439, declares the law to be that:

> 439. An accomplice is a competent witness for the prosecution, although his expectation of pardon depends upon the defendant's conviction, and although he is a codefendant, provided, in the latter case, his trial is severed from that of the defendant against whom he is offered.

In Abbott's Criminal Briefs (1889, p. 207), the rule is thus stated:

> 1. *Accomplice as a witness.*—The general principle is that accomplices are now competent for or

against each other, unless jointly indicted; and even if jointly indicted they are competent against each other if separately tried. But the courts have a discretion whether to allow one to be used against the other, because this may imply a promise of immunity.

1. Thompson on Trials (1889) gives a converse rule:

641. *In the case of persons jointly indicted.*—In the case of persons jointly indicted, if there has been a severance, one defendant may call his late codefendant as his own witness, as a matter of right, and it has been held that he may do so, under such a statute, where there has been no severance. This is an exception to the rule of the common law that persons jointly indicted are not competent witnesses for each other.

Greenleaf on Evidence (edition of 1892) continues to present the law, as follows:

The admission of accomplices as witnesses for the Government is justified by the necessity of the case, it being often impossible to bring the principle offenders to justice without them. The usual course is to leave out of the indictment those who are to be called as witnesses; but it makes no difference, as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in crime.

* * * * *

But whether an accomplice already charged with the crime, by indictment, shall be admitted as a witness for the Government or not is determined by the judges, in their discretion, as may best serve the purpose of justice.

(See also 1 Archbold (8th ed.), p. 479, notes.)

In the case of *C. A. Benson* (impleaded, etc.) v. *The United States* (No. 1007, October Term, 1892), the question of the competency of a co-indictee to testify upon the separate trial of the criminal then being tried was presented to this court.

Counsel begs leave to refer to the brief submitted on behalf of the Government in that case for a further elaboration of his argument in this.

Holloman and Lewis can never be tried together, or by the same jury; the charge against one is now nowhere "written on the same piece of paper" as that against the other; they are neither codefendants nor co-indictees; they are connected only by the fact that they were accomplices in the crime committed at the Verdigris.

It goes without saying that if one who remains jointly indicted is a competent witness against his codefendant, then being tried separately, no standing is left for counsel who would contend that one who is not jointly indicted, one who is only indicted in an independent indictment that is lying by, is incompetent to testify on behalf of the Government.

III.

NO ERROR WAS COMMITTED BY THE ADMISSION OF THE TESTIMONY OF THE WITNESS MR. ISBELL, ALTHOUGH HIS NAME WAS NOT ENDORSED UPON THE INDICTMENT, AND DEFENDANT WAS NOT NOTIFIED OF HIS INTENDED USE AS A WITNESS.

The murder was committed June 15, 1888. Testimony was given in defendant's behalf tending to show that on that day defendant was at Tulsa, and an attempt was

made to fix the date by a letter or note written by witness Crutchfield for one Claywell, who, it is alleged, was under arrest there on that day in custody of Deputy Marshal Isbell. (Pp. 226, 243, 244, 246, 262, 265, 266, 268.)

It became of consequence on the part of the Government to show that Claywell was not there in Isbell's custody on that day.

On rebuttal the papers relating to Claywell's case were produced and proved by the deputy clerk and were put in in evidence (173–276).

The writ for the arrest of Claywell and the subpœna for the witnesses in the case are dated June 12, 1888.

The return to the writ shows the arrest of Claywell on June 17, and the return to the subpœna shows its service on the 18th.

Isbell's account shows the arrest to have been made on the same day that the return on the writ shows it, viz, the 17th.

The signatures were proved and the papers were offered and received in evidence and no objection was made on the part of the defendant, nor was any exception taken to this evidence or any portion of it.

Afterwards the witness Isbell was called by the Government and sworn, and testified to the signatures of the papers before mentioned, and stated that he arrested Claywell on the 17th of June (pp. 281, 284). No objection was made to this testimony and no exception was noted against its admission. *The State* v. *Schmidt* (34 Kans., 399, 403) is in point.

misplaced

upon the part of the Government, the Government could not give him notice of the witness. It could not anticipate, because the testimony of Isbell outside of the testimony of the defendant, had nothing to do with the case. This would defeat the administration of justice, because no matter how false the defense the Government could never refute it. Even stopping the trial for two days that notice might be given would not avail, as the law says that notice must be two days before the trial commenced. The law is not made to aid criminals in escaping justice. No objection was offered to the introduction of Isbell, and no exception was taken to his admission as a witness. This, without anything else, would render that objection nugatory.

IV.

By the terms of the fourth assignment of error defendant complains that the court below failed to direct the jury as to how they should find the foundation of the conspiracy, and failed to point out that the testimony of an accomplice alone as to the formation of the conspiracy was insufficient. There is no setting forth of the part of the charge referred to, "in so many words."

The charge was made on October 26, and the conclusion thereof is followed by this sentence:

> To which charge the defendant at the time offered no objections (p. 305).

The jury returned its verdict on the same day (p. 3). October 31 the motion for a new trial was filed (p. 306).

The court below gives the State statute relied upon, and the views of that court upon the question in the opinion delivered upon the motion for a new trial, as follows (p. 316):

> It is further complained that the name of Isbell was not entered on the indictment. Section 1033 of the statute provides that witnesses to sustain an indictment shall be put on the indictment, together with their place of residence.
>
> "When any person is indicted of treason, a copy of the indictment and a list of the jury and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial."
>
> I am not aware that this section has received any reported construction. What does it mean? Does it mean that the Government can not, under any circumstances, use a witness unless the defendant has had notice served on him two entire days before the trial? How could the Government in this case say before the trial that Isbell would be a relevant witness? He was not a relevant witness until he was made so by the action of the defendant. His testimony was not pertinent until that time. Then must the defendant have two days' notice of any such witness as he can make a material witness by the state of case that he may establish, or attempt to establish, by the evidence offered by him after the trial commenced? When such a witness is called for the purpose of rebutting evidence offered by him, called

Only two grounds of complaint are set forth, and they are as follows:

> First. Because the court erred in its charge and misinstructed the jury upon the law of the case.
>
> Second. Because the verdict of the jury is against the law and the evidence.

January 11, 1892, a motion, called an amended motion, for a new trial was filed, asking for the same on the grounds of newly-discovered evidence, and setting forth alleged errors, with more or less particularity (pp. 306–311).

There is an apparent attempt to tie this motion to the charge on page 305, but, it is submitted, this is in accord with no proper or permissible practice, certainly so far as a review of the case by writ of error is concerned.

Not only was the charge received without objection or exception on the part of defendant, but no instructions to the jury were requested on his behalf.

The assignment is negative, and it disregards the spirit and intent of rule 35 of this court.

The charge of the court upon the question involved appears in the record (pp. 301 to 303), and it is submitted that it is unobjectionable.

V.

The fifth assignment of error sets forth a claim that the court in its charge gave "undue prominence to the cautionary rules by which they should weigh" testimony given by the defense in endeavoring to establish an alibi.

No instructions were asked. No objection was made to any portion of the charge, no exception was taken, and rule 35 is openly and directly ignored. An omission to except is not cured by a subsequent motion for a new trial.

The portion of the charge relating to the alleged alibi is set forth at the foot of page 300 and top of page 301, and is in accordance with the law.

VI.

The sixth assignment of error seeks to bring before this court all of the questions brought before the court below by the motion for a new trial filed two and one-third months after the termination of the trial, including the question relating to a new trial on the ground of newly-discovered evidence, and those based upon the charge.

If such practice could be applied to questions arising out of the charge, then that portion of rule 35 which requires that—

> When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given ro instructions refused,

would be practically ignored.

Assignments of error Nos. 2, 3, 4, and 5 are substantially the same as subdivisions 9, 5, 7, and 8 of the amended motion for a new trial.

But it seems to be sufficient to note that it is settled law that the granting or refusal of a motion for a new trial is always addressed to the discretion of the court, and will not be reviewed by this court.